CONSTITUTIONAL LAW: PRESCRIBED COURSES OF STUDY IN PUBLIC SCHOOLS AND THE CONSTITUTIONAL GUARANTY OF RELIGIOUS LIBERTY—The constitution of California provides for control of public education by the legislature in the very general statement that "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."[1] The "suitable means" available to the legislature are limited, of course, by the Bill of Rights forming Article I of the constitution, which is also designed to preserve the rights and liberty of the people. One of the rights there guaranteed is that of the free exercise and enjoyment of religious worship.[2]

The legislature has availed itself of the general authorization given it by creating a complex system of compulsory education. It has prescribed the required courses of study[3] and made it the duty of boards of school trustees and teachers to enforce such prescribed courses,[4] giving them the right to expel pupils refusing to comply with their regulations or to follow these courses of study.[5]

One of the prescribed courses for elementary schools is physical education.[6] Beyond providing that this training be of a certain duration,[7] and generally designed to promote the physical, mental and moral welfare of the children,[8] the various code and statutory provisions do not attempt to settle administrative details. These are left to the boards of school trustees and the teachers employed by them. The general legislative provisions are such that it cannot be fairly said that they in any way infringe upon the constitutional guarantees as to personal rights, whether of religious or other liberties. What is to be done, however, when

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[1] Cal. Const., Art. 9, § 1; School Law of California, 1921, p. 1.

[2] Cal. Const., Art. 1, § 4: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinions or matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

[3] Pol. Code § 1665; School Law of California, 1921, pp. 163-164.

[4] As to trustees, Pol. Code § 1607; School Law of California, 1921, p. 127. As to teachers, Pol. Code § 1696; School Law of California, 1921, p. 198.

[5] Pol. Code § 1684, School Law of California, 1921, p. 188, "All pupils must comply with the regulations, pursue the required course of study, and submit to the authority of the teachers of said schools." Pol. Code § 1685; School Laws of California, 1921, p. 188, provides for suspension or expulsion for continued wilful disobedience or open and persistent defiance of the authority of the teacher.

[6] See supra, n. 3.

[7] The provisions as to physical education are found in sections 1610, 1665, 1668 of the Political Code (on pages 136, 164, 165, School Law of California, 1921), and in the "Act Providing for Physical Education," Cal. Stats. 1917, p. 1176; School Law of California, 1921, p. 61.

[8] Section 2 of the Physical Education Act, see supra, n. 7:

a school board, in the administration of such legislation, is said to have infringed the right of religious liberty by providing, as the only means of fulfilling the requirement obligatory on the pupils, a form of physical training repugnant to the religious principles of a child or his parents?

When a child has been expelled from school because of his refusal to participate in the form of physical training provided as being against his religious principles, he may, through his parents, apply for a writ of mandate ordering the board of school trustees to reinstate him. It seems clear that, where the application for such a writ shows that the only physical training provided is of a sort which conflicts with the tenets of an established religion or sect, it should be granted. To avoid conflict with the constitutional guaranty of religious liberty, the administration of the physical education laws should be so designed as to furnish optional forms of training in such situations as this.

A slightly different question is presented where the complaint merely makes a general averment that the physical training offered was "offensive to the conscientious scruples and contrary to the religious beliefs of the said children and of plaintiff and his said wife." This was the statement as to required physical training in the form of dancing, made by the plaintiff in *Hardwick v. Board of School Trustees of Fruitridge School District.*[9] The Superior Court entered judgment refusing to issue the writ of mandate, on plaintiff's refusal to amend his complaint after a demurrer to it had been sustained. The District Court of Appeal reversed this judgment in a decision which, by the generality of its expressions, seems to open opportunties for an invasion of the rights and liberties which public education is designed to protect fully as alarming as the invasion of the right to religious liberty against which the judgment is directed.

With the first premise on which this decision is based—that the courts have the right to examine local regulations said to be violative of fundamental personal rights—no one can quarrel. But when such examination proceeds on the theory that the conscientious moral scruples of a parent form a sufficient basis for finding such violation of a right, one may doubt its justification under California law. This is especially true where, in final effect, the violation chiefly objected to by the court is that of the right of parental control rather than of parental religion.

Section four of Article one of the California Constitution protects freedom in religion only. It is not considered, in statements in the principal case itself, to cover the conscientious moral scruples of the pacifist. In the realm of morals it is not always easy to distinguish between those tenets which are and those which are not subversive of the social or political order. There are those, indeed, who regard dancing as an expression of natural

[9] (October 28, 1921) 36 Cal. App. Dec. 517. Hearing in Supreme Court denied December 30, 1921.

instinct, whose artificial suppression may result in serious social problems. To submit such questions to the court would seem to be beyond the intent and scope of this provision. Should not its application be limited to those cases where infringement of specific religious tenets can be and is shown in the complaint based on it?

If general moral scruples do not of their own right fall under the constitutional protection, they cannot be shoved there by the force of a theory as to the right of parental control. The Compulsory Educational Law[10] requires that the child be educated at a public school or privately. If he is enrolled in a public school he must pursue the required course of study.[11] A parent who objects to the legislative requirements has no power to alter them. He must either interpose an adequate statement of their invalidity as to him, or educate his children privately.[12] That line of decisions of which Kelley v. Ferguson[13] is cited as representative, which grants to a parent the power of reasonable objection to prescribed courses, has developed in states whose education laws do not contain the detailed mandatory provisions of the California Political Code. They do not seem applicable to the California situation.

R. R. L.

PLEADING: INCONSISTENT DEFENSES—Inconsistency within the bounds of a single plea has always been regarded as objectionable.[1] This is believed to be the one common ground of agreement between all jurisdictions, both historical and contemporary. Under the earlier common-law practice all inconsistencies necessarily came within this rule, as a defendant was strictly limited to one plea.[2] However, this restricted form of pleading was superseded by the Statute of Anne,[3] which, in effect, placed it within the discretion of the court to allow the defendant to plead as many separate defenses as he considered necessary.[4]

This statute was adopted by practically all, if not all, of the states of the United States as common law,[5] and remains the law

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[10] Cal. Stats. 1919, p. 407. School Law of California, 1921, p. 167.

[11] See supra, n. 5.

[12] State Board of Health v. Board of Trustees of Watsonville School District (1910) 13 Cal. App. 514, 110 Pac. 137.

[13] Kelley v. Ferguson (1914) 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. (N. S.) 266 and note. On the general subject of power to prescribe studies see 47 L. R. A. (N. S.) 200, note; 41 L. R. A. 593, note.

[1] See notes in 48 L. R. A. 177, 178; Ann. Cas. 1917C 704, 706 and cases there cited. Also, Hensley v. Tartar (1859) 14 Cal. 508; Bell v. Brown (1863) 22 Cal. 671; Buhne v. Corbett (1872) 43 Cal. 264; Eaton v. Metz (1895) 5 Cal. Unrep. 59, 40 Pac. 947.

[2] Auburn & O. Canal Co. v. Leitch (1847) 4 Denio (N. Y.) 65; Notes 48 L. R. A. 177, 178; Ann. Cas. 1917C 704, 706.

[3] 4 Anne, c. 16, § 4.

[4] The pertinent part of the statute reads as follows: "It shall be lawful for any defendant . . . in any action or suit . . . with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense."

[5] See cases cited in notes 48 L. R. A. 177, 178-181; Ann. Cas. 1917C 704, 706-708.